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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 493

LAKE CENTRAL AIRLINES, INC.,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Delta Air Lines, Inc. ("Delta"), the Petitioner below, prays that this Court will deny the Petition for Writ of Certiorari filed in No. 493 by Lake Central Airlines, Inc. ("Lake Central"). The Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered in *Delta Air Lines, Inc.*, v. *Civil Aeronautics Board* (2d Cir. 1960), 280 F.2d 43.[1]

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[1] Citations to the Opinion below will be to Appendix A of the Petition in No. 493, e.g., "(App. A, pp. 1a-10a)." References to material in the printed Joint Appendices will be by page number thereof, preceded either by the symbol "J.A." or by the symbol "A.J.A." The symbol "J.A." refers to the white-covered, three-volume Joint Apendix filed in Case No. 25,422, etc., in the Court below, and by stipulation made part of the record in this case. The symbol, "A.J.A." refers to the blue-covered, single-volume Additional Joint Appendix filed with the Court below in the instant case, No. 25,852.

COUNTERSTATEMENT OF THE FACTS

This case involves an administrative proceeding before the Civil Aeronautics Board (the "CAB" or the "Board"), known as the *Great Lakes-Southeast Service Case*. That proceeding was concerned with the air service needs of an area extending between the Great Lakes and Florida. Only applications by so-called trunkline carriers were consolidated, as noted in Lake Central's Petition, but no restrictions were imposed which in any way limited the right of the applicants to seek both long-haul rights and rights to provide more short-haul types of service between intermediate cities in the area under consideration (CAB Orders E-9734, J.A. 78a *et seq.*, and E-10043, J.A. 111a *et seq.*).

In its decision (CAB Order E-13024 of September 30, 1958, J.A. 1313a), the CAB added six cities to Delta's existing Route 54, which prior to that time served Chicago and Miami with certain intermediate points, but by-passed Indianapolis. The addition of three of those cities,[1] Dayton, Louisville, and Indianapolis, permitted Delta for the first time to offer service between them and cities in the Southeast and Florida, and also between them and certain other, more nearby points already served by Route 54. Since Indianapolis already was an authorized intermediate point on another Delta Route—Route 8—between New Orleans and Detroit, inclusion of Indianapolis as an intermediate point on Route 54 had the additional effect, which the Board recognized and approved (E-13024, J.A. 1323a, 1346a-1347a), of permitting Delta to serve cities on *both* of these routes on the *same* flights, provided that the flights stopped at the "route junction point" of Indianapolis.

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[1] The addition to Delta's authority of the other three cities, Columbus, Toledo and Detroit, which permitted Delta for the first time to offer service between the Southeast and those cities, has no bearing on the question presented in this case.

Although, as Lake Central's Petition states at page 5, the CAB imposed restrictions on a number of new certifications granted to other applicants in order to protect existing local service carrier operations, *none* of these restrictions were imposed upon the certifications made to Delta.[1] No restrictions of any kind were imposed upon Delta's new Dayton, Louisville, and Indianapolis authorities.

By the Board's September 30 order, Delta's new certificate, incorporating this additional authority, was to become effective sixty days thereafter on November 29, with the proviso that *prior* thereto the Board might extend that effective date upon its own initiative or in recognition of a timely-filed petition for reconsideration of the order (J.A. 1384a). The certificates of other carriers who had received new authorizations in the *Great Lakes-Southeast Case* had the same effective date and were subject to the same proviso (J.A. 1379a, 1388a, 1394a and 1400a).

Petitions for reconsideration were in fact filed. One of them was filed by Lake Central, as noted at page 5 of that carrier's Petition to this Court. Lake Central sought, *inter alia,* to have restrictions imposed on Delta's service between four pairs of cities which, as the result of the addition of Indianapolis and Louisville to Route 54, Delta was enabled to serve without restriction under the certificate authorized by the Board's September 30 decision.[2]

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[1] The restrictions which were imposed upon Delta (E-13024, J.A. 1355a-1356a), were all imposed for other reasons not here pertinent.

[2] Lake Central's Petition to this Court mentions only the Chicago-Indianapolis and Indianapolis-Cincinnati markets which Delta was authorized to serve as a result of the addition of Indianapolis to Route 54 between the already certificated points of Chicago and Cincinnati (Petition, p. 5). The other two markets originally mentioned by Lake Central were Indianapolis-Louisville and Cincinnati-Louisville.

Although Lake Central's Petition to this Court does not mention the fact, that carrier also requested the CAB to maintain the *status quo* in the event the CAB could not dispose of Lake Central's petition for reconsideration before November 29, 1960, because:

> "The amended certificate for route No. 54 issued to Delta pursuant to Order No. E-13024 will become effective on November 29, 1958, unless such effective date is extended by the Board . . ." (Lake Central Petition for Reconsideration, A.J.A. 1591a-1592a).

On November 28, 1958, the CAB issued its Order E-13211 (J.A. 1469a *et seq.*) which, with one exception, *refused to stay the effective date of any new certificate*, thus denying Lake Central's plea for stay of the Delta certificate. The Board assigned two interrelated reasons for its refusal to grant the requested stays. First, after reviewing the various petitions for reconsideration, the Board found that they did not make sufficient showing of probable legal error or abuse of discretion, except in the one exception already mentioned, to justify such a stay. Second, the Board stated that it wished to have the new services inaugurated in time for the peak period of winter travel (J.A. 1470a-1471a). As the Petition herein notes (p. 6), Order E-13211 then closed with the statement that it was not a disposition of the several petitions for reconsideration on their merits (J.A. 1495a-1496a).

The one exception where a stay was granted involved new authority which had been awarded to Eastern Air Lines. Piedmont Aviation, Inc. (another local service carrier) sought to overturn an extension which had been granted of Eastern's Route 6 from Charleston, West Virginia, to Chicago. In its opinion accompanying Order E-13211, the Board found that Piedmont's objection to this additional Eastern authorization *did* raise serious questions; and it was for that reason that the Eastern

certificate's effective date was stayed until further action could be taken by the Board (J.A. 1493a-1494a).

For reasons not relevant here, Delta's new certificate actually became effective on December 5, 1958, rather than upon November 29, 1958 (see A.J.A. 1593a-1595a). On January 1, 1959, pursuant to schedules filed with the Board, Delta inaugurated service under the new certificate between Chicago and Indianapolis, with flights continuing beyond Indianapolis southward to Evansville, Indiana, a city which Delta was authorized to service on its previously-established Route 8, and shortly thereafter also inaugurated service between Louisville and Indianapolis, services which would not have been permitted under the restrictions which had been requested by Lake Central.[1]

On May 7, 1959, over five months after Delta's new, unrestricted authority became fully effective, and four months after Delta inaugurated new services pursuant to schedules filed with the Board, the Board issued the order of which complaint was made in the Court below (E. 13835, J.A. 1509 *et seq.*). This order purported to constitute the Board's formal disposition of the various petitions for reconsideration of the September 30 decision which had not been disposed of when the certificate was allowed to become effective. The order did in fact modify the former decision, one modification being the imposition upon Delta of the restrictions requested by Lake Central, so that a Delta flight serving any of the four pairs of cities mentioned in Lake Central's reconsideration request was thereafter required to originate at Atlanta or at a point on Route 54 south thereof. One effect of the restrictions was to render illegal the service which Delta already had inaugurated in good faith between Evansville and Chicago via Indianapolis, and between Indianapolis and Louisville.

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[1] By informal agreement with the CAB, Delta has refrained from inaugurating additional service in these ten markets (except such as would be permitted even if the restrictions were imposed), pending resolution of this proceeding.

Lake Central speaks at page 4 of its Petition to this Court about its previously-existing authority between Chicago and Indianapolis and between Indianapolis and Cincinnati. The fact is, however, that the restrictions which the CAB purported to impose upon Delta were not designed to protect any existing authority held by Lake Central, but rather related only to authority which Lake Central hoped to obtain in another, pending proceeding (see Order E-13835, J.A. 1511a-1512a).

Upon Petition by Delta the Court below stayed the effectiveness of Order E-13835 and, in its later decision, found that the Board was without power to impose the additional restrictions upon Delta's certificate by means of reconsideration after the certificate had become effective.

Lake Central was admitted in the proceeding below as an Intervenor, although the carrier did not file a brief with the Second Circuit.

ARGUMENT

Lake Central presents what appear to be two different grounds for seeking review by this Court, namely, (a) that the decision below conflicts with the decision of this Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947) and with decisions by other Courts of Appeals, thus giving an erroneous construction to the language of Sections 401(f)[1] and 401(g)[2] of the Federal Aviation Act[3]

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[1] 72 Stat. 754, 49 U.S.C. 1371(f).

[2] 72 Stat. 754, 49 U.S.C. 1371(g).

[3] 72 Stat. 731, 49 U.S.C. 1301. Between the time of the Board's initial action and the modification on reconsideration, the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401) was supplanted by the Federal Aviation Act. The provisions of the former Act here involved were re-enacted without change, and there ad-

(Petition, pp. 9-11); and (b) that the decision below will cause confusion as to the point in time at which the Board's "authority" to reconsider its decisions and orders terminates (Petition, p. 11). Delta will show that neither of these grounds contains any substance which justifies burdening this Court with review of the Second Circuit Decision.

It will be shown that the decision below is in full accord with the *Seatrain* decision and, indeed, with a long line of decisions by this Court, other Circuits, and administrative agencies; that the Court's construction of the pertinent Federal Aviation Act provisions was eminently correct; and that the decision below has eliminated, rather than created, confusion as to the proper time for termination of the administrative process in new airline route cases. Lake Central just disagrees with the conclusion of the Court below; but such disagreement forms no basis for issuance of a Writ of Certiorari. As this Court said in *Magnum Import Company* v. *De Spoturno Coty*, 262 U.S. 159, 163 (1923);

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ . . ." (Emphasis added)[1]

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mittedly is no issue stemming from the supplantation of the Civil Aeronautics Act.

[1] Although the *Magnum* case was decided before the amendments made by the Judiciary Act of 1925, the force of the above-quoted

I. The Decision Below Is in Full Accord With the *Seatrain* Decision, and With Other Decisions by This and Other Courts, and Therefore Properly Construes the Federal Aviation Act.

When reduced to its essence the decision below is merely this: Because the CAB is a creature of Congress, its "powers are purely statutory,"[1] and it therefore can act only ". . . as specifically authorized by Congress."[2] The foregoing quotations are from the *Seatrain* case, with which Lake Central contends the decision below conflicts. But rather than departing from the principles laid down in *Seatrain*, a case which involved a situation quite analogous to the one here involved (App. A to Lake Central's Petition, p. 6a), the Second Circuit rather applied the well-settled law of that case to the clear and unambiguous language of Sections 401(f) and 401(g) of the Federal Aviation Act. The decision below merely rejects, as did *Seatrain*, an agency attempt to read into its organic statute a power which Congress explicitly chose not to grant—a power which would create an *implied* exception to a limitation which Congress clearly *did* impose.

The limitation which Congress imposed is upon the CAB's power to modify certificates once they are granted. Congress specified in Section 401(f) that:

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language has not been vitiated. The essence of the Act of 1925 was curtailment of this Court's appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions (*Ex Parte Republic of Peru*, 318 U.S. 578, 600 (1943)). Furthermore, the quoted language from *Magnum* has been cited with approval within just the past few years, *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

[1] *Seatrain Lines, Inc.* v. *United States*, 64 F. Supp. 156, 160 (D.C. Del. 1946), *aff'd*, 329 U.S. 424 (1947).

[2] *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 433 (1947).

> "Each certificate shall be effective *from the date specified therein*, and *shall continue in effect* until suspended or revoked as *hereinafter* provided . . ." (Emphasis added).

And as the Court below held—a holding which Lake Central does not contest—the next succeeding Section, Section 401(g), is the only provision in the Act which expressly deals with modification of effective certificates (App. A to Lake Central's Petition, p. 6a). Section 401(g) admittedly was not followed here.

The exception to this Congressionally-prescribed procedure for which Lake Central contends is evident in its complaint that the Court below has read the Act "so as to make Sections 401(f) and 401(g) applicable merely upon the technically effective date of the certificate, even though timely petitions for reconsideration of the award of amended certificate authority have been received and are still pending the Board's decision" (Petition, pp. 8-9). The Court below, of course, did not "make" those Sections applicable upon such a date; it merely gave effect to the fact that Congress, in the above quoted language, provided that that is how the Sections would take effect. Lake Central, therefore, is objecting to the Court's refusal to read into the unqualified language of Sections 401(f)[1] and 401(g) an *implied* exception to cover situations where the CAB has left petitions for reconsideration pending on the effective date specified in the certificate to which the petitions are directed.

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[1] Although Section 401(f) does state three exceptions to its rule as to the inviolability of certificates after the effective dates specified therein, none of them are applicable here: a certificate conferring temporary authority ceases to be effective upon the expiration of its term; a certificate will cease to be effective if the Board certifies that operations under the certificate have ceased; and if the carrier fails to inaugurate service authorized by a certificate within ninety days of authorization, the Board upon notice and hearing may revoke the unusued authority (see App. A to Petition, p. 6a).

As will be seen, there is no basis upon which any such exception can be founded. It might first be noted, however, that whereas Lake Central implies that the decision below will make reconsideration of CAB decisions difficult, the implication is not at all true. Lake Central's argument rather is an attempt to amend the Statute on the basis of administrative expediency—an attempt to give the CAB more time for the reconsideration process whether or not a certificate has gone into effect. Affirmance of such a position, of course, would destroy the chief aim of Congress in providing for certificates in the first place—to give the carriers route security (*Lea*, 83 Cong. Rec. 6407 [1938]). In any event, the Statute as now written gives the CAB all the time needed to reconsider decisions without impairing the value of certificates once made effective.

Thus, the CAB now has three courses of action open to it, each of which would be in full accord with the law: (a) to act on petitions for reconsideration within the sixty-day grace period before certificate effectiveness for which new certificates invariably provide (see *e.g.*, J.A. 1379a, 1384a, 1394a, and 1400a); (b) to allow for a longer grace period than sixty days in new certificates in any instance where the complexity of the proceeding indicates that reconsideration might involve protracted consideration of difficult issues; or (c) to further extend (stay) the effective date of a new certificate if, as the end of the originally-specified grace period is approached, it appears that additional time will be needed for reconsideration. Any one of these steps will provide for full completion of the administrative process *without* departure from the Statute as written and without violation of the certificate holder's rights to due process.

Furthermore, none of these three courses of action will unduly impede the administrative process. This is evident from the fact, to be explained below, that hereto-

fore the CAB *has* consistently followed steps (a) and (c) as outlined above, with no discernible adverse effect upon its discharge of the responsibilities imposed upon it by Congress.[1] This case, therefore, does not have to be approached, and it was not approached by the Court below, on the basis that denial of the position urged by Lake Central will curtail administrative freedom.

Lake Central is unable to point to any specific language in Section 401(f), Section 401(g) or elsewhere in the Statute which states the implied exception for which it contends—or, indeed, which even mentions reconsideration of certificates under any circumstances. Lake Central does, however, point to the language underscored in the following quotation from this Court's opinion in *Seatrain, supra,* 329 U.S. 424 at 432-433 (Petition, p. 11):

> ". . . The certificate, when finally granted *and the time fixed for rehearing it has passed,* is not subject to revocation in whole or in part except as specifically authorized by Congress . . ." (Emphasis added).

The underscored language, however, is inapplicable in a proceeding under the Federal Aviation Act.

The quoted language was concerned with a certificate issued under the Water Carrier Act.[2] Contrary to the Federal Aviation Act, that Act does not specify the date upon which a certificate shall become effective, nor does it lay down a procedure for modifying a certificate once issued (see *United States* v. *Seatrain Lines, Inc., supra,* 329 U.S. at 430). Moreover,—again contrary to the Federal Aviation Act—the Water Carrier Act *does* contain elaborate provisions with respect to rehearing, reargu-

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[1] For a discussion of the fact that the law as applied by the Court below will not mean frustration of the administrative process, see *Ryan, Revocation of an Airline Certificate,* 15 Journal of Air Law and Commerce, pp. 377-389, at 389 (1948). The author is a former chairman of the Civil Aeronautics Board.

[2] 54 Stat. 929 *et seq.,* 49 U.S.C. 901 *et seq.*

ment, and reconsideration of agency decisions, orders, and requirements.[1] These two factors account for the Court's reference to the passing of "the time fixed for rehearing."

The only possible provisions in the Federal Aviation Act, however, upon which Lake Central can be relying are those in Sections 204(a) and 1005(d) which allow the Board, except as otherwise provided in the Statute, to "amend", "modify" or "suspend" its "*orders.*"[2] Because this broad and *general* language is the only thing in the Federal Aviation Act which even approaches provision for reconsideration of CAB actions, it is clear that it cannot modify the *specific* language of Sections 401(f) and 401(g) which, unlike the Water Carrier Act provisions, *do* prescribe with precision when a certificate shall become effective and do carefully outline the procedure thereafter to be followed in the event that it is desired to consider the possible revision of an effective certificate.

In any event, the very case—*United States* v. *Seatrain Lines, supra*—upon which Lake Central relies, makes it clear that such broad language as that contained in Sections 204(a) and 1005(d), referring to "orders", *cannot* be used to create a power to reconsider effective certificates. The *Seatrain* case rejected a similar argument. In that case, the Interstate Commerce Commission relied upon substantially identical language in the Water Carrier Act in attempting to create for itself a power which Congress had not specifically granted to modify certificates. This Court held (329 U.S. at 432):

"Nor do we think that the Commission's ruling was justified by the language of Sec. 315(c), 49 USCA

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[1] Section 316(a) of that Act, 54 Stat. 946, 49 U.S.C. 916(a) incorporating Section 17(6) of the Interstate Commerce Act, 24 Stat. 385, 49 U.S.C. 17(6).

[2] 72 Stat. 743, 49 U.S.C. 1324(a), and 72 Stat. 794, 49 U.S.C. 1485(d), respectively, set out in the Appendix hereto.

> Sec. 915(c), 10A FCA title 49, Sec. 915(c), which authorizes it to 'suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.' *That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used in the Act.* Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word 'order.' Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word 'certificate.' . . . It is clear that the 'orders' referred to in 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. *But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding . . .*" (Emphasis Added).

As noted earlier, this Court went on to hold that *certificates* can be modified only in the manner specifically authorized by Congress.[1]

Thus, rather than providing support for Lake Central's present attempt to create an implied exception to Section 401(f), the *Seatrain* case clearly supports the contrary ruling of the Court below.

The *Seatrain Case* was not the first time, nor the last, that in analogous situations it has been decreed that an

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[1] Application of this Court's interpretation in the *Seatrain* case of the Interstate Commerce Act provisions to the similar language of Section 1005(d) of the Federal Aviation Act is reinforced by the very next Section of the latter Statute, Section 1005(e), 72 Stat. 794, 49 U.S.C. 1485(e). In that Section Congress specifically mentioned "certificates" separately from "orders", implying clearly that the two terms cannot be read as having the same meaning. Section 1005(d) mentions only "orders."

agency must follow procedures specifically prescribed by Congress, and not attempt by inference to create for itself other powers not expressly conferred. Thus, in *Seatrain*, this Court cited an earlier decision by the Interstate Commerce Commission under the language of Section 212(a) of the Motor Carrier Act,[1] which Section is substantially similar in content to Section 401(f) and 401(g) of the Federal Aviation Act. As this Court put it:

> ". . . in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in Section 212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Re Smith Bros. Revocation of Order*, 33 MCC(F) 465" (329 U.S. 429, at 430-431).

As the Interstate Commerce Commission had put it in the *Smith Bros* case itself:

> ". . . We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefore appears and until all controversy is determined, but *once a certificate, duly and regularly issued, becomes effective our authority to terminate it is expressly marked off and limited.* All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated but *the certificate marks the end of the proceeding*, just as the entry of a final judgment or decree marks the end of a court proceeding . . ." (Emphasis Added).

In exact accord, see *Hergott* v. *Nebraska State Ry. Commission*, 15 N.W. 2d 418, (Neb. 1944).

One of the more important decisions decided since the *Seatrain* case is *Watson Bros. Transportation Company* v. *United States*, 132 F. Supp. 905 (D. Neb. 1955), affirmed by this Court, 350 U.S. 927, (1956). A three-judge Dis-

[1] 49 Stat. 555, 49 U.S.C. 312(a).

trict Court in that case ruled, under those provisions of the Motor Carrier Act which are similar to Sections 401 (f) and 401(g) of the Federal Aviation Act, that:

> ". . . The only statutory authority for the suspension, change, or revocation of such a certificate by the Commission is contained in Section 212(a) . . .
>
> ". . . Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212(a), it is invalid.
>
> ". . . the order . . . is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued" (132 F. Supp. 905 at 909).

In the *Watson* case there was a deliberate attempt by the Interstate Commerce Commission to implement a change of heart through modification, without notice and hearing, of a previously-effective certificate.

Except for the fact that no petition for reconsideration had been filed (the Commission acted upon its own motion) the *Watson Case* is on all fours with this one. As the Court below found (App. A to Petition herein, pp. 7a-8a)—findings which are not contested by Lake Central—in this case there is no suggestion of inadvertent error, no suggestion that at the time it was put into effect Delta's certificate mistakenly contained greater authority than the Board intended to confer by its earlier decision granting the certificate. The Court further found it to be "affirmatively clear" that when the CAB refused, just prior to the certificate's effective date, to extend that date as Lake Central had requested in order to permit reconsideration, the CAB was fully aware of the arguments which subsequently led it on May 7, 1959 (five months after the certificate became effective, and four months after Delta had inaugurated service under that certificate) to impose the restrictions of which Delta complains.

The fact is, therefore, that in the interim the CAB changed its policy, an arbitrary—or at least unilateral—

administrative decision which did not and could not invest the CAB with authority to modify an effective certificate without adherence to Section 401(f) and 401(g) procedures, *United States* v. *Watson Bros. Transportation Company, Inc., supra; American Trucking Associations, Inc. et al.* v. *Frisco Transportation Company,* 358 U.S. 133, 181 (1958). The Board's actions were all taken deliberately and, like the Interstate Commerce Commission action involved in *Watson,* constitute an invalid attempt, contrary to specific statutory limitations, to change a certificate duly issued.

Lake Central refers to "prior uncontested actions" by the agency (Petition, p. 9) where the CAB allegedly has amended certificates on reconsideration after their effective dates (Petition, p. 7). It is interesting to note that Lake Central cites the Court to no examples of this alleged past course of conduct. The fact is, however that to the best of Delta's knowledge, the agency previously has done so on only the four occasions out of the hundreds and hundreds of cases decided by the CAB, which are cited in footnote 7 on p. 10 of the related Petition of the CAB in No. 492.[1] These four examples in truth are scattered *exceptions* to the CAB's *consistent* and *contrary* course of conduct ever since 1948—a course of conduct which clearly has constituted recognition by the CAB of its *lack* of power to reconsider an effective certificate. In its *Kansas City-Memphis-Florida Case,* 9 C.A.B. 401 (1948), the CAB said:

> "... We have grave doubt, however, as to our possession of such power ..." (9 C.A.B. 401 at 408-409).

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[1] Although the CAB cites five examples in said footnote, one of them, *United-Western, Acquisition of Air Carrier Property,* 11 C.A.B. 701 (1950), "involved a Board procedure entirely different from that in the present case" (App. A to Lake Central Petition, p. 9a, ftn. 11).

In view of this doubt, the agency went on to announce that:

> "... in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case" (*ibid.*).

Since rendering this decision, the CAB consistently has made a new certificate effective sufficiently long after the decision date, usually sixty days (as in this case), to permit reconsideration if requested, and has conditioned even such an advance effective date upon a power reserved unto itself to extend the date further if necessary to allow additional study of petitions for reconsideration. Moreover, in cases decided before this one, the CAB repeatedly has used this power to postpone the effective date of certificates during reconsideration. (The cases are collected at pages 29-32 of Delta's Brief, and at pages 9-12 of Delta's Reply Brief, to the Court below.)

Indeed, as the Second Circuit found (App. A to Lake Central's Petition, pp. 8a-9a), the CAB even has represented to at least one court that it has been the agency's practice heretofore to stay the effective date of a certificate in order to permit it time to consider the merits of petitions for reconsideration, *Southwest Airways* v. *Civil Aeronautics Board* (9th Cir. 1952), 196 F. 2d 937, 938. Moreover, just this past week, the CAB issued an order in another proceeding (the *Great Lakes Local Service Investigation*, C.A.B. Docket 4251 *et al.*), in which the CAB again recognized that unless it stays the effective date of certificates until it can dispose of petitions for reconsideration, it will lose the power to do so. Except for the actual ordering language staying the effectiveness of the new certificates there involved, that order in its entirety reads as follows:

> "Various petitions for reconsideration of the Board's decision in the above-entitled proceeding (Order E-15695, dated August 25, 1960) have been filed and it appears that the Board's consideration of these petitions will not be completed until after November 8, 1960, the date presently fixed for making effective the amended certificates issued as part of the Board's decision herein. In order to preserve the status quo until the Board has had adequate opportunity to dispose of the aforementioned petitions, we find that it is in the public interest to stay the effectiveness of the certificates in question" (Order E-15995, November 4, 1960).

In view of this consistent past practice by the CAB, it is difficult to believe, as Lake Central now alleges, that it "did not seek judicial stay of the effective date of . . . [Delta's] . . . amended certificate" (Petition, p. 7) when the CAB put Delta's certificate into effect without first disposing of Lake Central's petition for reconsideration, because the carrier believed the Board had been following a different practice (*ibid.*). Indeed, the very fact that in its petition to the CAB for reconsideration Lake Central stated that "the amended certificate . . . will become effective on November 29, 1958, unless such effective date is extended by the Board . . ." (A.J.A. 1591a-1592a) and for that reason requested an administrative stay of the certificate's effective date beyond November 29, 1958, in the event the Board could not by then dispose of the petition for reconsideration (*ibid.*), shows that Lake Central in fact assumed that the CAB was without power to reconsider a certificate after it had taken effect.

Lake Central argues that if the court below is not reversed, Lake Central will be compelled to institute a new proceeding before the Board seeking the amendment of Delta's certificate (Petition, p. 9). Lake Central apparently means that it might request the CAB to institute a Section 401(g) proceeding. As the carrier's argument recognizes, Congress *has* provided in Section 401(g) for

such modification proceedings. All that the Court below has held is that the CAB must adhere to these specified procedures and not create new procedures of its own because it thinks some other method is better than the one ordained by Congress. And that also is the essence of *this* Court's holding in *Seatrain, supra.* The decision below comports fully with the rationale of the *Seatrain* case and does not, as Lake Central contends, fail to give proper recognition to that decision.

Lake Central also would find a conflict between the Second Circuit decision and two decisions of other United States Courts of Appeals, *Frontier Airlines, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1958), 259 F. 2d 808, and *Waterman Steamship Corp.* v. *Civil Aeronautics Board* (5th Cir. 1947), 159 F. 2d 828, *rev'd other grounds,* 333 U.S. 103 (1948). The allegation is wrong.

In point of fact there could be no conflict between the Circuits because this is the first time that the question here involved has been raised and specifically decided in a case involving the Federal Aviation Act or its predecessor, the Civil Aeronautics Act.[1] While a somewhat similar question, among many other unrelated questions, was raised in *Frontier, supra,* that case did *not* involve the precise same issue raised here concerning diminution of the complainant's effective authority on reconsideration. More important, perhaps, the Court in *Frontier* did not purport to rule upon any related issue; in this respect it merely decided a question as to the CAB's power to act upon petitions for reconsideration—and even then only with the Court's approval—after a petition for *judicial review* had been filed.

The Court in *Waterman* was not even confronted with the issue raised here. That case concerned only the time-

[1] 52 Stat. 977, *et seq.*, 49 U.S.C. 401 *et seq.*

liness of a petition for review. No action had been taken by the CAB on reconsideration which changed its original decision.

Clearly, the decision of the Court below is fully consistent with the decision of this Court in *United States* v. *Seatrain Lines, Inc., supra;* is not inconsistent with a decision of any other Court of Appeals; and properly construes the provisions of the Federal Aviation Act in conformity with a long line of judicial and administrative decisions.

II. The Decision Below In No Manner Will Cause Confusion as to the Time at Which the Board's "Authority" to Reconsider Its Decisions and Orders Terminates.

Lake Central concludes its argument by making the strange statement (Petition, p. 11) that:

> ". . . If this conflict is not resolved, in . . . [Lake Central's] . . . opinion the way will be opened for a deluge of filings seeking premature judicial stays of Board orders because of the confusion created by the decision below and the parties' inability to determine at what point the Board's authority to reconsider its own decisions and orders terminates . . ."

The statement is absurd; if one thing now *is* clear, it is when the Board's "authority" to reconsider a certificate-awarding decision terminates, namely, as of the effective date of the certificate. There had not been any question about this matter for years, because Congress had so clearly stated the applicable rule in Sections 401(f) and 401(g), until the Board arbitrarily departed in this case from its past, consistent adherence to the provisions of those Sections. It was this sudden departure by the CAB which has created the confusion; and it is the decision of the Court below which again rights the matter.

The Board is given no specific statutory power of reconsideration. As a result, in the case of certificates of public

convenience and necessity, the Board must reconsider the underlying decision, if at all, *before* the certificate is allowed to go into effect because Congress *has* stated that "*Each certificate shall be effective from the date specified therein,* and shall *continue* in effect until suspended or revoked as *hereinafter* provided . . ." (Section 401[f]). All the Court below did was tell the Board to follow this clear Congressional mandate. No possible confusion will result.

CONCLUSION

For the foregoing reasons, Delta Air Lines, Inc., respectfully submits that a Writ of Certiorari should not issue in No. 493.

Respectfully submitted,

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APPENDIX A

Statutes and Regulations Involved

I. *Federal Aviation Act of 1958*, 72 Stat. 737 *et seq.*, 49 U.S.C. 1301 *et seq.*

A. *Section 204(a)*

GENERAL AUTHORITY

"The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act."

(72 Stat. 743, 49 U.S.C. 1324[a])

B. *Section 401(f)*

EFFECTIVE DATE AND DURATION OF CERTIFICATE

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided . . ."

(72 Stat. 754, 49 U.S.C. 1371[f])

C. *Section 401(g)*

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

"The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public con-

venience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

(72 Stat. 754, 49 U.S.C. 1371[g])

D. *Section 1005(d)*

SUSPENSION OR MODIFICATION OF ORDER

"Except as otherwise provided in this Act, the Administrator or the Board is empowered to suspend or modify their orders upon such notice and in such manner as they shall deem proper."

(72 Stat. 794, 49 U.S.C. 1485[d])

E. *Section 1005(e)*

COMPLIANCE WITH ORDER REQUIRED

"It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the . . . Board under this Act affecting such persons so long as the same shall remain in effect."

(72 Stat. 794, 49 U.S.C. 1485[e])

II. *Interstate Commerce Act*, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*

A. *Sections 17(6), 17(7) and 17(8)*

REHEARING, REARGUMENT, OR RECONSIDERATION OF DECISIONS, ORDERS AND REQUIREMENTS

"(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for reconsideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this

paragraph, any application for rehearing, reargument or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing."

REVERSAL OR MODIFICATION AFTER REHEARING, ETC.

"(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order."

STAY OF DECISIONS, ETC., NOT EFFECTIVE AT TIME OF APPLICATION FOR REHEARING, ETC.

"(8) Where application for rehearing, reargument, or reconsideration of a decision, order or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision,

order, or requirement has not yet become effective, the decision, order or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division, but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

(24 Stat. 385, as amended, 49 U.S.C. 17(6), (7) and (8))

III. *Motor Carrier Act* (Part II of Interstate Commerce Act), 49 Stat. 543, as amended, 49 U.S.C. 301 *et seq.*

A. Section 212(a)

SUSPENSION, CHANGE, REVOCATION AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

"Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: . . ."

(49 Stat. 555, as amended, 49 U.S.C. 312[a])

IV. *Water Carrier Act* (Part III of Interstate Commerce Act), 54 Stat. 929, 49 U.S.C.A. 901 *et seq.*

A. *Section 316(a)*

"The provisions of section 17 . . . of this title shall apply with full force and effect in the administration and enforcement of this chapter."

(54 Stat. 946, 49 U.S.C. 916[a])

V. *Regulations of the Civil Aeronautics Board,* 14 C.F.R. 302.1 *et seq.*

A. *Rule 37*

"(a) *Time for Filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within twenty (20) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. . . ."

(14 C.F.R. 302.37)